

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

COURTNEY L. FORD,

Defendant-Appellant.

---

UNPUBLISHED

March 15, 2005

No. 254003

Wayne Circuit Court

LC No. 99-003952-01

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of vehicular manslaughter, MCL 750.321, and leaving the scene of an accident resulting in serious injury or death, MCL 257.617. He was sentenced to concurrent prison terms of ten to fifteen years for the manslaughter conviction and forty to sixty months for the leaving the scene of an accident conviction. He appeals as of right. We affirm defendant's convictions but remand for resentencing.

Defendant's convictions arise from a February 12, 1999, automobile accident in which six-year-old Jasmine Bradley, a pedestrian, was struck and killed by a vehicle driven by defendant. According to witnesses, the road conditions were dangerous that evening. The roads were covered with a layer of black ice and were slippery. At approximately 8:30 p.m., the six-year-old victim, her two older sisters, and a friend left a store located on the corner of Plymouth Road and St. Mary's Street in the city of Detroit. According to an accident investigator from the Detroit Police Department, the lighting in the area around the store was good. The group walked between two cars, which were parked in front of the store in a parking lane, and attempted to cross Plymouth Road after Malika Thompson, the victim's oldest sister, observed that the light at the next intersection was red and no cars were coming. Thompson testified that when she stepped into the first traffic lane on Plymouth Road, she slipped on the ice. When she looked up, the red light at the next intersection had changed, and a car was approaching at a high rate of speed. Thompson pulled the victim toward her, but the car flew past them and hit the victim. The vehicle never stopped, and Thompson noticed that it braked only after traveling a couple of blocks down Plymouth Road. Emergency medical response was slow to arrive to assist the victim. Because of the road conditions, the emergency vehicle could not travel more than fifteen miles an hour. The victim suffered numerous injuries, including multiple skull fractures and a crushing injury to the front of her brain, and subsequently died from cranial cerebral injuries.

Lorenzo Colbert was traveling westbound on Plymouth Road in the left traffic lane at the time the victim was struck. He was traveling between fifteen and twenty miles an hour because of the road conditions. When he neared the corner of St. Mary's Street, a light-colored Jeep Cherokee passed him on his right. It was traveling in the same direction as Colbert's vehicle, but it was moving at a high rate of speed, between fifty and sixty miles an hour. Colbert testified that the Jeep was moving too fast for the road conditions. Colbert observed that a big, male figure was driving the vehicle. Colbert also observed pedestrians in the street ahead and noticed that one of them had fallen. He hoped the Jeep would not hit the pedestrians. The Jeep, however, continued to travel at a high rate of speed. It "kind of" swerved a little, as if it was trying to miss something, but it never braked. After the Jeep hit the victim, Colbert followed it. The Jeep turned off Plymouth Road and made one more turn before pulling into a driveway. Colbert never lost sight of the vehicle. When the vehicle stopped, a man dressed in dark clothes exited the driver's side and ran into a house. Colbert passed the driveway where the Jeep was parked and then quickly turned around. When he stopped to obtain the license plate number of the vehicle and the address of the house, he observed that the same man, who previously ran from the vehicle, was outside looking at the side of the Jeep. Colbert spoke to the man, pretending to be looking for someone. At trial, Colbert identified defendant as the man.

John West, another eyewitness, was standing outside of the store waiting for his daughter when he saw four people attempt to cross Plymouth Road. One of them fell on the ice. West noticed the victim looking at the person who had fallen. West then saw the Jeep "flying down" the street. It hit the victim and kept on going. It never stopped. He believed that the Jeep was traveling between fifty and sixty miles an hour. West could not identify the driver but testified that the driver was a "big" person.

Based on information provided by eyewitnesses, the police recovered the Jeep at a home occupied by defendant and Brandy Williams. They initially arrested Brandy Williams, whose grandfather owned the Jeep. Defendant was later arrested and charged. At trial, he presented an alibi defense, claiming that he never left his home on the evening of the crime.

## I

Defendant first challenges the sufficiency of the evidence to support his conviction of involuntary manslaughter. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). This standard applies to bench trials. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

While the penalty for involuntary manslaughter is codified, MCL 750.321, the definition is found in common law. *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001). In *Herron*, the Court stated:

This Court has defined the common-law offense of involuntary manslaughter as “the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.” The kind of negligence required for manslaughter is something more than ordinary or simple negligence, however, and is often described as “criminal negligence” or “gross negligence.” [*Id.* (citations omitted).]

In *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997), this Court identified the following elements of gross negligence:

(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.

(2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.

(3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [Citations omitted.]

In *McCoy*, this Court affirmed the defendant’s conviction for involuntary manslaughter, MCL 750.321, where two sisters were standing in the middle of Greenfield Road and were struck from behind by the defendant’s vehicle. *Id.* at 502. One of the sisters was killed and the other injured. *Id.* at 502-503. The defendant’s van was traveling at a speed of approximately fifty to fifty-five miles an hour, which was well in excess of the posted speed limit. *Id.* at 503.

A violation of the speed limit, by itself, is not adequate to establish the element of gross negligence. However, under certain circumstances, a violation of the speed limit can be gross negligence. To state the obvious, a jury could properly determine that traveling at a speed of one hundred miles an hour through a residential neighborhood is gross negligence. Similarly, given the right conditions, it is possible to drive in a grossly negligent manner even in the absence of exceeding the speed limit (e.g., in heavy traffic, on slick roads, or in fog). Accordingly, the appropriate consideration is not whether defendant was exceeding the speed limit, but rather, whether defendant acted with gross negligence under the totality of the circumstances . . . . [*Id.* at 504.]

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to establish the elements of gross negligence. The act of driving requires the exercise of ordinary care and diligence to avert injury to other people. *McCoy, supra* at 503. Further, in this case, eyewitnesses, several police officers, and an emergency medical technician testified that the road conditions were icy and slippery on the night of the victim’s death. Evidence was presented that because of the dangerous conditions, it was apparent to other drivers that the use of ordinary care and diligence to avoid injuries to others required vehicles to be driven at low rates of speed, between ten and fifteen miles an hour. There was also evidence that despite the obviously dangerous conditions, defendant was traveling at an estimated speed of fifty to sixty

miles an hour, never slowed his Jeep as he approached the victim and other pedestrians, at best, merely tried to swerve at or around something without ever slowing, and failed to apply his brakes even after the accident had occurred. A rational trier of fact could have determined that defendant had the ability to avoid the harm by exercising ordinary care when approaching pedestrians who were in a well-lit area and in clear view, specifically by traveling at a lower rate of speed given the existing road conditions and by slowing down or attempting to slow down. The evidence was sufficient to enable a rational trier of fact to find that defendant failed to use the care and diligence required under the circumstances, even though it was apparent that the result of this failure of care and diligence was likely to prove disastrous. Defendant's conviction of involuntary manslaughter was warranted.<sup>1</sup>

## II

Defendant next argues that the prosecutor abused his discretion by charging defendant with involuntary manslaughter because the facts supported the lesser offense of negligent homicide. Our review of a prosecutor's charging decision is limited to determining whether an abuse of power occurred. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999).

"It is well settled that 'the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.'" *Id.*, quoting *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). If supported by the facts, the prosecutor has broad discretion to proceed under any applicable statute. *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996). A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Defendant speculates that the decision to charge him with manslaughter as opposed to negligent homicide was based on the young age of the victim, the sensationalism of the crime and his failure to stop at the scene. He does not, however, offer any information or evidence to support that the charge was brought for an unconstitutional, illegal, arbitrary, or discriminatory reason. As previously discussed, the facts in this case supported the charge of involuntary manslaughter and were sufficient to enable the trier of fact to convict on the charge. Under the circumstances, the prosecutor did not abuse his power in charging defendant with manslaughter.

## III

Finally, defendant challenges the trial court's decision to upwardly depart from the minimum sentence range under the legislative sentencing guidelines of twenty-nine to fifty-seven months. Defendant was sentenced to ten to fifteen years' imprisonment.

A departure from the sentencing guidelines is permitted only if there is a substantial and compelling reason for the departure. *People v Babcock*, 469 Mich 247, 255, 272; 666 NW2d 231 (2003). MCL 769.34(3) provides:

---

<sup>1</sup> Because we find that the evidence was sufficient to support defendant's conviction for manslaughter, MCL 750.321, we reject defendant's argument that at most the facts supported a conviction of negligent homicide.

A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

A "substantial and compelling" reason is an objective and verifiable reason that keenly or irresistibly grabs our attention, is "of considerable worth" in deciding the length of the sentence, and exists only in exceptional cases. *Babcock, supra* at 257, 272. The trial court must articulate the reason for the particular departure on the record. *Id.* at 258-259, 273. Whether a factor is objective and verifiable is reviewed de novo. *Id.* at 265. However, whether a reason is substantial and compelling is reviewed for an abuse of discretion. *Id.* at 266. If this Court determines that the trial court did not have a substantial and compelling reason to justify its departure, resentencing is required. *Id.* at 266. Where a trial court articulates multiple reasons and some are not substantial and compelling, we must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Id.* at 260, 273.

In departing from the sentencing guidelines range in this case, the trial court stated:

This is a case where the witness saw the collision and followed the car. Wrote the license plate number down. I heard all of that and the Court is really not inclined to show any kind of leniency in this case because this man capiased in 1999. This is now five years later. And while he was on capias status went out and committed another offense for which he is now on federal, serving a federal sentence. So, I don't think there is any reason - - A life has been taken. I believe he did it. I would have found him guilty if we had tried the case over again. I'm going to sentence him to serve the maximum ten to fifteen. *I'm going to ignore the guidelines because of what he did. That after being on capias status when I done convict - - Not playing it safe, but went out and did something else. So, he wasn't all that afraid to come in here. And I believe that he is a continuing danger to the community. After speeding on an icy street, slipping on black ice at night and causing the death of a what eight year old child?* And on the matter [leaving the scene of the accident] forty to sixty months to run concurrently with the ten to fifteen. [Emphasis added.]

No written departure evaluation was filed.

The trial court's determination that defendant continued to be a danger to the community was not an objective and verifiable factor. Objective and verifiable facts are those that are external to the minds of the judge and others and are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). While defendant committed a drug offense after absconding on bond, the trial court's determination that defendant continued to be a danger to the community at the time of his sentencing was a subjective assessment and not an external fact that was capable of being confirmed. Therefore, it could not be relied upon in departing upward from the sentencing guidelines. *Babcock, supra* at 257, 272.

Additionally, the fact of the victim's death and the circumstances of the crime were accounted for in the sentencing guidelines. Thus, those factors were inappropriately considered by the trial court when departing from the guidelines. MCL 769.34(3)(b). Defendant was convicted of manslaughter, MCL 750.321, on a theory of gross negligence. Manslaughter is a class C felony, MCL 777.16p, and defendant's minimum sentence was calculated using the minimum sentence ranges for Class C felonies, MCL 777.64. Further, defendant received a score of one hundred points for offense variable (OV) 3, MCL 777.33, which accounts for physical injuries suffered by the victim and is scored at one hundred points where a victim is killed. He also received the maximum ten points for OV 17, MCL 777.47, which accounts for wanton or reckless disregard for the life of another person. MCL 769.34(3)(b) prohibits a trial court from departing from the guidelines based on an offense or offender characteristic already accounted for in determining the appropriate sentence range *unless the court finds from the facts* that the characteristic has been given inadequate or disproportionate weight. The trial court did not make such a finding in this case.

The only remaining reasons articulated for the upward departure were that defendant did not appear for sentencing until five years after his conviction and that he committed a federal drug offense during that time. These factors are objective and verifiable on the record and were not accounted for in the determination of defendant's minimum sentence range under the guidelines. But to the extent these factors are worthy of consideration, and could be considered substantial and compelling, it is not apparent that the trial court would have departed from the guidelines on the basis of these reasons alone, or whether it would have departed to the same degree. We emphasize that substantial and compelling reasons justifying a departure exist only in exceptional cases. *Babcock, supra* at 258. From the record, it appears that when the trial court upwardly departed from the recommended minimum sentence range it was very much focused on facts of the case which were already considered by the guidelines. We therefore remand for resentencing. *Id.* at 260. On remand, if the trial court again determines that an upward departure is justified for substantial and compelling reasons, it must not only articulate those reasons on the record but must also consider whether the reasons justify the particular departure imposed. *Id.* at 264.

Affirmed in part and remanded for resentencing.

/s/ Kurtis T., Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly